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In The

Supreme Court of the United States

October Term, 1982

W. LAWSON KING,

Petitioner,

vs.

MONTGOMERY COUNTY, MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

In a "quick-take" condemnation case, is it a violation of the due process clause of the Fourteenth Amendment to deny a landowner notice and an opportunity to be heard before the condemnor dispossesses the landowner of his property?

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No.

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OPINION DELIVERED BELOW

On January 6, 1983, the Court of Appeals of Maryland filed a Per Curiam, unreported opinion which affirmed the ruling of the Circuit Court for Montgomery County, Maryland. Copies of these opinions are included in the appendix to this petition.

JURISDICTION

The Per Curiam decision of the Court of Appeals of Maryland was filed January 6, 1983, and the Mandate issued on February 7, 1983. Jurisdiction is invoked under Title 28 U.S.C. §1257.

RELEVANT CONSTITUTIONAL AND CODE PROVISIONS

The pertinent sections of the Maryland Constitution and the Montgomery County (Maryland) Code are set out in full in the Appendix:

Article III, §40A Constitution of Maryland

§49-50 Montgomery County Code

STATEMENT OF THE CASE

W. Lawson King, Petitioner, is the owner of a 400-acre grain and cattle farm in Montgomery County, Maryland. The Respondent, Montgomery County, Maryland, condemned a portion of the Petitioner's property for the purpose of constructing a highway across a portion of the farm. The highway was one which the landowner argued was designed, planned, and contracted solely and singly by the Mayor and Council of the City of Rockville, as an extension of the City's street and road system. Rockville is the county seat of Montgomery County, Maryland.

In instituting the condemnation proceedings, the County exercised its "quick-take" powers granted to it by Article III, Section 40A of the Maryland Constitution. By virtue of the "quick-take," the County was empowered to enter and take possession

of the landowner's property immediately upon the filing of a petition and upon its deposit with the Court of its estimate of just compensation.

Upon learning of the condemnation petition filed by the County, the landowner moved to vacate the "quick-take" condemnation. As stated above, the landowner argued that the construction of the highway was undertaken solely by the City of Rockville, which is not empowered with "quick-take" authority. The City of Rockville may condemn only by conventional procedures; i.e., to determine and pay the just compensation before taking possession.

Numerous documents and allegations of fact supported the landowner's position. Because the construction of the highway was undertaken by the City of Rockville, the landowner argued that the County had no right, power, or authority to utilize its

"quick-take" powers to condemn for a governmental body not empowered with "quick-take" authority.

The Motion to Vacate further alleged the unconstitutionality of §49-50 of the Montgomery County Code, under which the County proceeded. The allegedly defective section permits the County to dispossess a landowner of his land without prior notice or an opportunity to be heard, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. The landowner argued that he should have been served with the condemnation petition and should have been given an opportunity to challenge the authority of the County to "quick-take" before the County actually dispossessed him of his land. This was especially important in this case because the landowner in fact took the position that the County had no

legal authority to condemn his property via "quick-take" procedures.

The Circuit Court for Montgomery County denied the Motion to Vacate on the grounds that (1) the County had the authority in this case to condemn for this highway and that (2) the allegedly unconstitutional section of the Code was constitutional.

The case was appealed to the Court of Special Appeals of Maryland, the intermediate appellate court. The Court of Appeals, the highest court of the state, issued sua sponte a Writ of Certiorari to the Court of Special Appeals. In a Per Curiam decision the Court of Appeals affirmed the lower court's decision.

The landowner now petitions this Honorable Court to consider and determine the important constitutional issues presented in this case.

ARGUMENT

The issue presented by this case is a narrow one involving an important question of federal constitutional law which has not been, but should be, settled by this Court. The issue involves the exercise by local governments of summary condemnation procedures and the resulting dispossession of landowners of their property without prior notice of such summary procedures and without an opportunity to challenge the authority to exercise those procedures. The landowner has challenged the local procedure which dispossessed him of his property on the basis of his Fourteenth Amendment right to due process of law.

In Sweet v. Rechel, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188 (1895), the Supreme Court gave approval to procedures by which a condemnor could take immediate possession of and title to property if

guarantees of prompt ascertainment and payment of just compensation were given. In 1919, this Court decided Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135 (1919), a condemnation case in which the landowner challenged the lack of any provision affording him an opportunity to be heard with respect to the necessity or expediency of the taking. The Court held that:

> "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." Id., p. 58

Thus, this Court has approved a procedure by which a landowner may be summarily dispossessed of his property without notice or an opportunity to be heard on the necessity and expediency of the taking.

Beginning in 1969, this Court decided a quartet of cases in which certain summary dispossession procedures were deemed unconstitutional under the Fourteenth Amendment due process requirements. Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 49 (1969); Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 113, 31 L.Ed.2d 424 (1972); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 198 (1974): These cases stand as constitutional landmarks and are recognized by students of constitutional law as the genesis of the "modern standard of due

process." They dealt with use by a creditor of certain statutes permitting creditors to attach, garnish, or replevy property of a debtor in summary fashion without notice to the debtor or an opportunity to be heard. The cases stand for the proposition that before an individual may be deprived of his property, due process requires that a hearing be held upon proper notice.

To what extent is this "modern standard of due process" applicable to deprivations of private property by "quick-take" condemnation procedures? This question has yet to be directly addressed by this Court. The State of Maryland, at least, has made it clear that it does not recognize the modern due process standard of notice and hearing as being applicable to summary deprivations of property via condemnation. Your petitioner suggests that there is no reason why the deprivation of a property owner's

farmland is not entitled to the same, if not more, protection than personalty. It is submitted that it is of public importance for this Court to determine the extent to which the due process requirements laid down in Sniadach and its progeny are applicable to summary deprivations of property by way of "quick-take" condemnation procedures.

The United States District Court for the Northern District of Texas addressed the issue in Joiner v. City of Dallas, 380 F.Supp. 754 (1974) (per curiam, three-judge panel), aff'g. mem. 419 U.S. 1042 (1974). As in the present case, the landowner complained that the summary possession of his property by the condemnor was violative of the due process clause of the Fourteenth Amendment. The landowner argued, as the Petitioner does, that he was not permitted to challenge the authority of the condemnor

to take his land. The Court dismissed the argument, citing to the fact that, under the appropriate ordinance, the landowner had two alternate means by which to raise the issue. The Court in dicta, however, addressed the landowner's suggestion that the modern standards of due process were violated by the procedure used. In response, the Court stated that:

> "It may well be that the minimum standards of due process approved as constitutional in earlier eminent domain cases is no longer adequate to protect the property owners. Perhaps the time has come for the Court to overrule Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135 (1919); Sweet v. Rechel, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188 (1895); and the numerous other cases we have cited. It is, however, beyond the power of this court

to refuse the clear mandates of the Supreme Court." Id., p. 773.

While a petition for writ of certiorari is not the appropriate place to suggest that "the time has come for the Court to overrule" earlier cases, the Petitioner does urge that the time has come to at least consider the issue.

On appeal to the Supreme Court, the lower court three-judge panel was affirmed by memorandum. There was no oral argument and no opinion written. Because a decision of a three-judge panel is given an automatic right to appeal, this Court was required to make some determination. The nature of the appeal and the lack of any opinion suggests that all the issues were not thoroughly and adequately explored. It is further stated that the affirming memorandum noted that Mr. Justice Powell felt the case merited oral argument.

The issue raised in this case is not one which has received a great amount of judicial attention. Perhaps the reason for this is that most "quick-take" statutes provide the landowner some opportunity to judicially challenge the authority of the condemnor to take such action. As previously stated, even in the Joiner case in which this identical issue was raised, the Court dismissed the argument because the landowner had two alternate judicial methods of challenging the condemnor's right to "quick-take." See also City of Baltimore v. Kelso Corp., 281 Md. 514, 380 A.2d 216 (1977) in which a landowner is, by statute, given 10 days to challenge a "quick-take" petition before the condemnor is entitled to take possession.

The present case does not deal with the question of the right to a hearing to determine the necessity for the condemnation.

Necessity is concededly a legislative question and is not open to judicial challenge at any point in the proceedings. This case deals with the ability to present a meaningful challenge to the authority or power of the condemnor to exercise "quick-take" procedures. Clearly, if the condemnor is not empowered to condemn, the landowner should be entitled to challenge the alleged authority. If a condemnor acts improperly and exercises "quick-take" powers which it in fact does not possess, the landowner must suffer the loss and potential destruction of his property without being informed of the condemnation and without being afforded an opportunity to prevent the potential abuse of power.

CONCLUSION

For these reasons, it is suggested that this Court should consider the issue presented in light of the modern standards of due process, and it is respectfully requested that this Honorable Court issue a Writ of Certiorari to the Court of Appeals of Maryland in this case.

Respectfully submitted,

BROWN AND STURM
Attorneys for Petitioner

RELEVANT CONSTITUTIONAL AND CODE PROVISIONS

Article III, §40A, Constitution of Maryland, reads, in pertinent part:

"The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation. . .and where such property is situated in Montgomery County and in the judgment of and upon a finding by the County Council of said County that there is immediate need therefor for right of way for County roads or streets, the County Council may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof, or into court, such amount as a licensed real estate broker appointed by the County Council shall estimate to be the fair market value of such property, provided that the Council shall secure the payment of any further sum that may subsequently be awarded by a jury. . . . This Section 40A shall not apply in Montgomery County or any of the various municipal corporations within Cecil County, if the property actually to be taken includes a building or buildings. (1912, ch. 402, ratified Nov. 4, 1913; 1959, chs. 224)."

Montgomery County Code, §49-50, reads:

"Pursuant to the authority granted by section 40A of article III of the Constitution of Maryland, the following is established as a procedure to be followed at the option of the county for the acquisition of land which may be required for right of way for county roads or streets:

"(a) When in the judgment of and upon a finding by the county council that there is immediate need to acquire private property for right of way for county roads or streets, the county council shall by resolution state such finding, describe the property, list the owner or owners thereof as they shall appear on the assessment records of the county, appoint a licensed real estate broker to estimate the fair market value of such property under this optional procedure. In such resolution, the county council shall also guarantee the payment of any further sum above the estimated fair market value, as hereinafter provided for, that subsequently may be awarded by a jury.

"(b) Immediately upon his appointment, the licensed real estate broker shall estimate the fair market value of the property which is the subject of the proceeding and shall submit a written report of such estimate to the county. The county thereupon may by petition naming the owner or owners thereof and all persons of record whose interest in the property is to be taken pay into the circuit court the amount estimated by the licensed real estate broker to be the fair market value of such property, and shall record a copy of the resolution of taking among the land records of the county. A copy of the resolution shall also be attached to

the petition. A copy of the petition and resolution shall be served upon all persons named in the petition pursuant to rules of the court for service after the initial pleading. A copy of the petition and resolution shall be filed with the supervisor of assessments for the county who shall forthwith adjust the tax assessment records. The county may then immediately take possession of the property described in the resolution without further notice to the property owner or owners or other persons of interest and may proceed with the road or street project. Payment into court of the amount estimated by the licensed real estate broker to be the fair market value of the property shall in no way limit the amount that may be allowed subsequently by a jury, and the guarantee of the county to pay any further sum that may subsequently be awarded by a jury shall remain in effect until the final disposition of the proceeding.

"(c) The owner of such property taken shall be entitled, upon written request to the clerk of the court, to receive such amount as was paid into the court, provided such owner agrees in writing filed with the clerk to pay back to the county the difference between such amount and a final award made by a jury, if such final award is less than the amount paid into court.

"(d) Upon payment of the money into court as aforesaid, the county shall proceed to negotiate with the owner of the property affected in an effort to obtain by amicable negotiation such right, title and interest of the owner's property as is necessary for the road or street project upon which is based the need to acquire such property. If the county and the owner of such property are unable to agree upon a sum

to be paid for the property after payment of the money into court as aforesaid, such owner may request the county to institute condemnation proceedings, and upon such request the county shall, within ninety days of such request, institute such proceedings in accordance with the procedure established in article 33A of the Annotated Code of Public General Laws of Maryland; provided, that the county on its own may institute such proceedings at any time.

"(e) The jury award upon any property taken under this procedure shall be based upon the value of the property at the time of payment by the county into the court.

"(f) The county shall not be required to accept the aforesaid estimate of the licensed real estate broker and, before payment into court as provided hereinabove, may withdraw from the proceeding upon payment of the costs thereof, and in such event the county shall not be entitled to take possession of the property; provided, that nothing herein shall be construed to constitute a waiver by the county of the right to institute a condemnation action or new proceedings under this section against the same property or to preclude subsequent acquisition thereof by negotiation with the owner.

"(g) The procedure established in this section shall not apply if the property actually to be taken includes a building or buildings."

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

RECEIVED
JAN 22 - 1982
LAW OFFICES SHAW AND STURM

MONTGOMERY COUNTY, MARYLAND	:	
Plaintiff	:	
v.	:	Montgomery County
W. LAWSON KING, ET AL.	:	Petition No. 254
Defendants	:	

MEMORANDUM AND ORDER

This matter is before the court on a motion by the defendant W. Lawson King, to dismiss the petition of plaintiff Montgomery County, Maryland and for declaratory and injunctive relief. The County's petition filed January 11, 1982, entitled "Petition of Advance Taking and Deposit of Funds", seeks immediate possession of a portion of Mr. King's property for the construction of a county road pursuant to authority granted by Article III, Section 40A, Maryland Constitution, and Chapter 49, Article III, Section 49-50 of the Montgomery Code (1972 Ed., 1977 Replacement Vol.). The defendant seeks a declaration that Section 49-50 is unconstitutional, and an injunction to prevent the plaintiff, Montgomery County, from entering upon his land to construct county roads.

The County's petition of advance taking and deposit of funds is another in a series of efforts being undertaken by Montgomery County and the City of Rockville to acquire land for the purpose of constructing a network of roads across Mr. King's property. The defendant has vigorously opposed these efforts, and is continuing the fight in this case. See Montgomery County v. William Lawson King and Cordelia E. King, Montgomery County Circuit Court, Misc. Pet. No. 5833, (on appeal to the Court of Special Appeals), and William Lawson King v. Montgomery County, Montgomery County Circuit Court, Equity No. 75385.

The property owned by Mr. King consists of a 400 acre cattle and grain farm located partially within Montgomery County and partially within the City of Rockville. The farm is roughly bounded by Shady Grove Road and Interstate Route 270 to the west, state Route 355 to the north and east, and partially developed residential and commercial property to the south. The farm is traversed by Fields Road, which runs southwest from Route 355 to the area of the Shady Grove Road interchange at Interstate 270. The farm's location is unusual in that it is surrounded by highly developed commercial and residential property as well as arterial thoroughfares either existing or proposed.

On January 11, 1982, the County filed the present petition in order to acquire a right-of-way plus a ten foot wide construction easement in order to extend Gude Drive along the southeastern corner of Mr. King's property. Gude Drive presently begins in the City of Rockville at its intersection with state Route 28 and extends northwesterly through property contained within the unincorporated area of the County, to its present terminus at Route 355. When completed, Gude Drive will extend from this point to and across Interstate Route 270 to its eventual terminus at Research Boulevard at the western boundary of the City. Although the majority of the current construction project will be within the City of Rockville, the only land which the County seeks to acquire from Mr. King for this road is entirely within the unincorporated area of the County.

The County bases its petition upon the authority granted by Article III, Section 40A, of the Constitution of Maryland, and Chapter 49, Article III, Section 49-50 of the Montgomery County Code (1972 Ed., 1977 Replacement Vol.), which permit the County to take immediate possession of property which it seeks to condemn

for right-of-way for county roads or streets before a final determination of its value. However, before doing so, certain procedural steps must be taken. The County Council must enact a resolution stating that there is an immediate need to acquire private property for county roads or streets, describing the affected property, listing the owners of the property, and appointing a licensed real estate broker to estimate its fair market value. Section 49-50(a), Montgomery County Code (1972 Ed., 1977 Replacement Vol.). Section 49-50(b) requires a written report of the realtor's written estimate to be submitted to the County. The County may then pay the amount estimated into the Circuit Court, record a copy of the resolution of taking in the land records, and file a petition of advance taking naming the owners and all persons of record whose interest in the property is to be taken. Finally, the County must serve all persons named in the petition with a copy of the petition and resolution. Once this procedure has been followed, the County may take immediate possession of the subject property "without further notice to the property owner or owners or other persons of interest and may proceed with the road or street project". Id.

In the case at bar, the County has taken the following steps in compliance with the procedural requirements set forth in the provisions of the County Code cited above. On December 8, 1981, the Montgomery County Council adopted Resolution No. 9-1306 stating that "there is an immediate need to acquire" the defendant's property and appointing E.L. Dieudonne, Jr., licensed real estate broker, to appraise the fair market value of the property to be taken. The resulting figure was fixed at $247,900.00 and this sum was deposited with the Clerk of the Circuit Court on January 11, 1982. On the same day the County's petition for advance taking was filed. On January 14, 1982, the defendant, W. Lawson King,

filed the subject motion to dismiss the County's petition, and to obtain declaratory and injunctive relief. The motion raised three issues for the Court's determination.

ISSUES

1) Whether County Resolution No. 9-1586 satisfies the procedural requirement contained in Chapter 49, Article III, Section 49-50(a) of the Montgomery County Code (1972 Ed., 1977 Replacement Vol.) that there be "a finding by the County Council that there is an immediate need to acquire private property for right-of-way for county roads or streets".

2) Whether Gude Drive is a county road or street such that Montgomery County may invoke the optional "quick take" provisions of Section 49-50 of the Montgomery County Code in order to acquire land for a right-of-way.

3) Whether Section 49-50 of the Montgomery County Code is unconstitutional in that the landowner whose property is being acquired is not provided with notice and an opportunity to be heard on the questions of immediate need and the intended use of the property.

These issues will be addressed in the order stated.

DISCUSSION

I. Finding of Immediate Need. The defendant challenges the County Council's finding that there is an immediate need to acquire the defendant's property on the ground that the drawings of Gude Drive appended to the County's petition were prepared by Kidde Consultants, Inc., the same firm that earlier prepared a metes and bounds description of the property for the City of Rockville, and that each document bears the same job number. The significance of this, according to Mr. King, is that the City of Rockville undertook all of the preparation and planning for the construction of Gude Drive. Therefore, Mr. King asserts, the

County Council's finding that there is an immediate need to acquire his property for the construction of Gude Drive was not an independent finding as required by Section 49-30(a) of the County Code.

The Court finds that the existence of identical job numbers has little bearing on the independence of the findings. In Resolution No. 9-1586 the County found that "there is an immediate need to acquire the properties described herein as right of way for a County road or street, specifically, the improvement of Gude Drive." (emphasis added) The fact that the firm which prepared the description of that property for the County was the same firm that prepared a description of the property for the City of Rockville does not mean that the County has failed to make the required finding. Nothing in Section 49-30 of the Montgomery County Code requires the County to hire its own independent consultant.

Moreover, because the legislature has authorized the County Council to take and acquire land for a right-of-way for county roads or streets, the selection of the land to be condemned is a matter for the Council to decide. When its decision is challenged the questions for the Court to decide are limited to:

> "(i) whether there is any necessity whatever to justify the taking, or (ii) whether the decision of the Council is so oppressive, arbitrary or unreasonable as to suggest bad faith." Free State Realty v. City of Baltimore, 279 Md. 550, 559 (1977), citing Wash. San Comm. v. Santorios, 234 Md. 342 (1964).

The Court has reviewed the entire record and there is nothing to suggest that the Council's decision was either oppressive, arbitrary or unreasonable. The Court therefore holds that the finding of necessity contained in Resolution No. 9-1586 meets the requirements of Section 49-30(a) of the County Code.

II. Is Gude Drive a County Road. The defendant bases his contention that the County may not invoke the optional "quick take" provisions of Section 49-30 of the Montgomery County Code to acquire the specific land in question upon a narrow reading of the term "county roads or streets". According to the defendant "county roads or streets" include only those within the unincorporated area of the County, and not those within the corporate limits and jurisdiction of the City of Rockville. Although of interest, this issue need not be reached because the facts indicate that the entire property which the County seeks to acquire from Mr. King is within the unincorporated area of the County.

The defendant also claims that the County may not invoke its optional "quick take" powers to take the property at issue because the Gude Drive extension is being constructed "solely and singly by the Mayor and Council of Rockville". After reviewing the facts in this case, the Court is convinced that the defendant's argument is without merit.

The facts indicate that although the majority of the Gude Drive extension will travel through the City of Rockville, the portion at issue here is entirely within the unincorporated area of the County. Furthermore, although the Rockville City Council adopted Ordinance No. 16-80, authorizing the construction of Gude Drive from Research Boulevard to State Route 355, the project has been on the County's list of capital improvement projects and the County's Shade Grove Sector Plan for quite some time. The County has also agreed to fund 75% of the project's cost, and substantial amounts of county through traffic will utilize the completed project. See Exhibits A, B and C attached to Plaintiff's Reply in Opposition to Motion to Dismiss Petition.

III. Constitutionality of Section 49-50. The most serious issue raised by the defendant is whether or not Section 49-50 of the Montgomery County Code complies with the due process guarantees of the Fourteenth Amendment of the United States Constitution, and with Article 24 of the Maryland Declaration of Rights. In particular, the defendant contends that Section 49-50 denies him notice and an opportunity to be heard on the issues of the immediate need for a county road and the intended use to which his property will be put.

This issue appears to be one of first impression in Maryland. Although plaintiff has cited two cases as dispositive, upon a close reading it is clear that neither case reached the present issue. See LaFontaine's Heirs, et al. v. LaFontaine's Heirs, et al., 205 Md. 311 (1953); State Roads Commission v. Franklin, 201 Md. 549 (1952).

In the latter case, the Maryland State Roads Commission invoked the provisionr of Article 3, Section 40B of the Maryland Constitution, as implemented by Article 89B, Section 9, Annotated Code of Maryland, (1951 Ed.) to acquire land which belonged to the appellee prior to condemnation trial. Section 9 of Article 89B authorized the State Roads Commission to:

> "enter upon and take possession of such property and rights-of-way as the State Roads Commission may deem necessary, and proceed with the highway construction, provided the said State Roads Commission shall first pay to the owner or owners thereof or into court, for his, her or their benefit, such sum as the said State Roads Commission shall estimate to be the fair value of the land and improvements taken..."

Although the provisions of this statute are similar to Section 49-50 of the Montgomery County Code, the issue in State Roads Commission v. Franklin, supra, was not whether Section 9 violated

the appellee's constitutional rights, but whether or not the proposed Baltimore-Harrisburg Expressway was within the definition of an "expressway" as contained in Section 18(c) of Article 89B of the Maryland Code (1951 Ed.). The trial judge held that it was not, and entered a judgment for the appellees upon a directed verdict. The Court of Appeals reversed, holding that the proposed expressway did comply with the definition contained in Article 89B Section 18(c) and that the State Roads Commission had authority to condemn the appellees' land.

In the course of its decision, the Court noted that the State Roads Commission was authorized to enter upon the appellee's property prior to the condemnation trial "where such property in the judgment of the State Roads Commission is needed by the State for highway purposes". Id. at 560, 561, citing Article III, Section 40B, Constitution of Maryland, as implemented by Article 89B, Section 9, Annotated Code of Maryland (1951 Ed.). The Court then reviewed the Commission's decision to enter the appellees' property before the condemnation trial and found that the Commission's decision was justified. In reaching that conclusion the Court stated at 201 Md. 561;

> "It would be difficult to build roads under any systematic program if each owner could delay construction until he had exhausted his legal remedy as to the amount of damages due him by the condemnation of his property".

Although the petitioner in the present case places great reliance upon the above cited language, this statement was made in the context of a judicial review of the Commission's actual decision to take the appellees' property, and not in response to an attack on the constitutionality of Article 89B, Section 9 of the Maryland Code. Therefore, the Court's statements concerning the validity of this statute do not resolve its constitutionality.

Similarly, in LaFontaines' Heirs, supra, the Court did not reach the issue of whether Article 89B, Section 9 complies with either Article 24 of the Maryland Declaration of Rights or with the due process clause of the Fourteenth Amendment. LaFontaine's Heirs determined that the rule of paying before taking in a condemnation proceeding by the State Roads Commission comports with Article 3, Section 40B of the Maryland Constitution, but did not address its constitutionality under Article 24 of the Maryland Declaration of Rights. Furthermore, the Court stated at 205 Md. 321 that;

> "it is not here claimed or even suggested in brief or argument, that the State Roads Commission in fact did not have authority to condemn or to enter before condemnation".

Therefore, neither State Roads Commission nor LaFontaine's Heirs addressed the issue at hand.

Lacking clear precedent under Maryland law, the Court turns to Federal law for assistance. In this regard it is important to note that the Court of Appeals had equated the phrase "due process of law" in the Federal Constitution with the phrase "law of the land" in the Maryland Declaration of Rights that "no man ought to be . . .deprived of his life, liberty or property, but . . . by the law of the land". See e.g. Crawford v. State, 285 Md. 431, 451 (1979); Steed Mortgage Co. v. Arthur, 37 Md. App. 292, 298 (1977). Therefore, Federal cases which have decided the constitutionality of an advance take statute under the Federal Constitution would be persuasive as to the validity of Section 49-50 under Article 24 of the Maryland Declaration of Rights.

Sweet v. Rachel, 159 U. S. 380 (1895) appears to be the basic case on the question of whether the condemnation and taking of private property without an advance hearing comports with due

process. In Sweet, the Court was asked to determine the constitutionality of a Massachusetts statute which permitted a municipal corporation to take private property before a condemnation hearing. The Court held that:

> "the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled..." Id. at 404. See also Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923); Joslin Co. v. Providence, 262 U.S. 668 (1923); Bragg v. Weaver, 251 U.S. 57 (1919).

The only limitation on this rule is that "adequate provision be made for the certain payment of the compensation without unreasonable delay". Id. at 62

The defendant claims that Sweet and cases following it do not comply with modern standards of due process, and that recent decisions by the Supreme Court require this Court to declare Section 49-30 unconstitutional. See Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U. S. 67 (1972); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); and Sniadach v. Family Finance Corp., 395 U.S. 337 (1967). This very issue was raised in Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex. 1974) (per curiam, three judge court), aff'g mem. 419 U.S. 1042 (1974). In Joiner the District Court held that a landowner has no due process right to receive notice or a hearing on the question whether his land may be condemned prior to the taking of his land. The Supreme Court affirmed the judgment of the lower court, thereby reaffirming Sweet. See also, Government of Virgin Islands v. 19.623 Acres of Land, 536 F. 2d 366, 379-71 (3rd Cir. 1976).

In Joiner the plaintiffs were threatened with the loss of their property under a Texas statute which, similar to Section 49-50, permits potential condemnors to acquire the right to possession prior to an adjudication of the right to condemnation or the amount of compensation to be paid. The plaintiffs argued that this statute violated their rights to procedural due process, and that the District Court should not follow the rule adopted by Sweet and later cases. The Court refused, but instead found that Sniadach, Lynch, Fuentes and Mitchell do not apply to the condemnation of property under the doctrine of eminent domain. The basis for the Court's decision is that these cases involved the rights of a private creditor to obtain possession of his goods from a debtor before giving him notice or an opportunity to be heard. In that situation the judiciary is requested to enforce an alleged right of possession which arises from a private contractual relationship, one which may have arisen through unequal bargaining powers, and thus create the potential for abuse of the judicial process by the creditor. In contrast, the power of eminent domain is a sovereign right of the State which may be exercised at any time, subject to only two restrictions, that the condemnation be for a public purpose and that just compensation be paid. Furthermore, the State is not a party with a selfish interest, but acts on behalf of the general public and is totally disinterested in the proceedings. Joiner, supra. at 773-774.

ORDER

Based upon the foregoing facts and law, it is this 30 day of March, 1982, by the Circuit Court for Montgomery County,

ORDERED, that the motion by the defendant, W. Lawson King, to dismiss the plaintiffs' petition be, and is hereby, denied; and it is further,

ORDERED, that the request by the defendant for an injunction to restrain the plaintiff, Montgomery County, Maryland, from entering upon his land to construct an extension to Gude Drive be and is hereby, denied; and it is further,

DECLARED that Section 49-50 of the Montgomery County Code does not violate the due process guarantees of the Fourteenth Amendment of the United States Constitution or Article 24 of the Maryland Declaration of Rights because of the statute's failure to provide a property owner with an opportunity to be heard on the issue of the immediate need for a county road and the intended use to which his property will be put prior to its being taken by Montgomery County.

Philip H. Fairbanks

Philip H. Fairbanks, Judge of the Circuit Court for Montgomery County, Md.

IN THE COURT OF APPEALS OF MARYLAND

No. 90

September Term, 1982

W. LAWSON KING

v.

MONTGOMERY COUNTY, MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Davidson
Rodowsky
Couch,
JJ.

PER CURIAM

Filed: January 6, 1983

PER CURIAM:

For reasons stated in the opinion of Judge Philip M. Fairbanks, of the Circuit Court for Montgomery County, filed March 31, 1982, in the case of Montgomery County, Maryland v. W. Lawson King et al., Petition No. 254, the denial of the injunction is hereby affirmed.

JUDGMENT AFFIRMED WITH COSTS

Office-Supreme Court, U.S.
FILED
APR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1495

In The

Supreme Court of the United States

October Term, 1982

W. LAWSON KING,

Petitioner,

vs.

MONTGOMERY COUNTY, MARYLAND,

Respondent.

On Petition For A Writ of Certiorari To The Court of Appeals of Maryland

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is Petitioner denied due process of law when, prior to Respondent's entry upon Petitioner's property under Respondent's advance-take authority, Petitioner has a full hearing before an impartial judicial tribunal to challenge the authority of Respondent to exercise its advance-take power?

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No. 82-1495

In The
Supreme Court of the United States

October Term, 1982

W. LAWSON KING,

Petitioner,

vs.

MONTGOMERY COUNTY, MARYLAND,

Respondent.

On Petition For A Writ Of Certiorari To
The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION

OPINION DELIVERED BELOW

On January 6, 1983, the Court of Appeals of Maryland filed a per curiam, reported opinion which affirmed the ruling of the Circuit Court for Montgomery County, Maryland. King v. Montgomery County, 453 A.2d 828 (Md. 1983).

STATEMENT OF THE CASE

This case involves a challenge by Petitioner to Respondent's exercise of its advance-take authority under Article III, Section 40A of the Maryland Constitution and Section 49-50 of the Montgomery County Code 1972 (1977 Replacement Volume).

On or about January 11, 1982, Respondent filed with the Circuit Court for Montgomery County, Maryland, a Petition of Advanced Taking and Deposit of Funds to obtain possession of a portion of Petitioner's property needed for Respondent's construction of the Gude Drive Extension. Prior to Respondent's entry upon Petitioner's property for road construction purposes, Respondent filed a Motion to Dismiss Petition and for Declaratory and Injunctive Relief. In said Motion, Petitioner challenged Respondent's exercise of its advance-take authority on three grounds:

1. Petitioner alleged that Respondent had failed to comply with the necessary procedural requirements of Section 49-50 of the Montgomery County Code;

2. Petitioner alleged that the Gude Drive Extension was not a county road and, therefore, Respondent lacked the authority to exercise its advance-take power in this case; and

3. Petitioner alleged that Section 49-50 of the Montgomery County Code was unconstitutional in that it did not provide Petitioner with notice and an opportunity to be heard on the exercise of Respondent's advance-take authority.

Both parties filed additional pleadings and memoranda of law addressing all issues raised by Petitioner. Similarly, oral argument by the parties was conducted before the Montgomery County Circuit Court on all of these issues.

Importantly, Respondent did not enter upon Petitioner's property for construction purposes until the issues raised in Petitioner's Motion to Dismiss were resolved by the Montgomery County Circuit Court.

On March 30, 1982, the Montgomery County Circuit Court, in a twelve-page, written opinion from Judge Philip M. Fairbanks, denied Petitioner's Motion to Dismiss and denied Petitioner's request for an injunction to restrain Respondent from entering upon Petitioner's land to construct the Gude Drive Extension. On the first issue raised by Petitioner in his Motion to Dismiss, Judge Fairbanks concluded that Respondent had complied with all applicable procedural requirements in its exercise of its advance-take authority in this case. On the second issue, Judge Fairbanks, in rejecting Petitioner's contention that the Gude Drive Extension was undertaken solely by and for

the sole benefit of the City of Rockville, Maryland, upheld Respondent's authority to exercise its advance-take power. Finally, on the third issue, Judge Fairbanks declared that Respondent's advance-take process did not violate the due process guarantee of the Fourteenth Amendment of the United States Constitution.

Following briefing and oral argument on all issues raised by Petitioner, the Court of Appeals of Maryland filed a per curiam, reported opinion which affirmed the ruling of the Montgomery County Circuit Court for the reasons stated in Judge Fairbanks' opinion.

SUMMARY OF ARGUMENT

There are no special or important reasons that would warrant review of this case by this Court on a Writ of Certiorari.

In his Petition for Writ of Certiorari, Petitioner seeks this Court's review of the constitutional issue Petitioner previously raised before the Court of Appeals of Maryland and before the Circuit Court for Montgomery County, Maryland. The decisions of both of these courts on this issue were in complete accord with prior decisions of this Court and all other federal courts that have addressed this issue. Petitioner cites no case law (federal or state) demonstrating (or even suggesting) a conflict among the courts on this question.

This Court had an opportunity to reverse its prior decisions establishing the due process standard applicable to the advance-take process but did not do so. Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex.) (per curiam, three-judge court), aff'd mem., 419 U.S. 1042 (1974).

This case is not an appropriate one for this Court to examine the constitutional issue raised by Petitioner. Before the Circuit Court for Montgomery County, Maryland, Petitioner was given a full hearing by an impartial judicial tribunal on his challenge to Respondent's authority to exercise its advance-take power in this case.

ARGUMENT

I. The Decision Of The Court Of Appeals On The Constitutional Issue Raised By Petitioner In His Petition For Writ Of Certiorari Was Consistent With Prior Decisions Of This Court And Other Federal Courts Addressing This Issue.

This Court has previously addressed the question of the due process standard applicable to a condemnation authority's exercise of its

advance-take power, the constitutional issue now raised by Petitioner in his Petition for Writ of Certiorari. United States v. Welch, 327 U.S. 546 (1946) (Reed, J. concurring); North Laramie Land Company v. Hoffman, 268 U.S. 276 (1925); Georgia v. City of Chattanooga, 264 U.S. 472 (1924); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923); Joslin Company v. Providence, 262 U.S. 668 (1923); Bragg v. Weaver, 251 U.S. 57 (1919); Sears v. City of Akron, 246 U.S. 242 (1918); Sweet v. Rechel, 159 U.S. 380 (1895). The decision of the Court of Appeals of Maryland on this issue was consistent with these prior decisions. King v. Montgomery County, Maryland, 453 A.2d 828 (Md. 1983).

The decision of the Court of Appeals of Maryland was also in complete accord with prior decisions from other federal courts which have addressed the same constitutional question. Government of the Virgin Islands v. 19.623 Acres

of Land, 536 F.2d 566 (3rd Cir. 1976); Joiner v. City of Dallas, 380 F.Supp. 754 (N.D. Tex.) (per curiam, three-judge court), aff'd mem., 419 U.S. 1042 (1974).

This case lacks any special or important reason that would warrant review by this Court on a Writ of Certiorari because there is no conflict among federal or state courts that have addressed the due process standard applicable to the exercise of a condemnation authority's advance-take power. Petitioner has cited no case law (federal or state) demonstrating (or even suggesting) a conflict among the courts on this issue.

II. This Court Had An Opportunity To Reverse Its Prior Decisions On This Constitutional Issue But Did Not Do So.

Contrary to Petitioner's contention, this Court had an opportunity to reverse the above-cited decisions establishing the due process standard applicable to the exercise of a

condemnation authority's advance-take power. This Court did not do so. Instead, in the Joiner case, this Court affirmed by memorandum opinion a decision of a federal district court (three-judge panel) which upheld the constitutionality of Texas' eminent domain statutes, which included an advance-take procedure. In so doing, this federal district court applied the due process standard previously established by this Court. The Joiner court specifically refused to apply the "modern" standard of due process developed through Mitchell v. W.T.Grant Company, 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Finance Corporation, 405 U.S. 538 (1972); Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969).

III. Petitioner Was Given The Hearing Before An Impartial Judicial Tribunal Which He Claims Is Denied To Him By Respondent's Advance-Take Process.

Factually, this case is not an appropriate one for this Court to examine the constitutional issue raised by Petitioner in his Petition for Writ of Certiorari. Before the Circuit Court for Montgomery County, Maryland, Petitioner was given the hearing which he now claims is denied to him by Respondent's advance-take process. Before that Court, Petitioner had a full opportunity to brief and argue his challenge to the authority of Respondent to exercise its advance-take power in this case. Factually, Petitioner's due process issue is not present in this case.

CONCLUSION

There are no special or important reasons that would warrant review of this case

by this Court. For the above-stated reasons, this Court should deny Petitioner's Petition for Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April, 1983, three (3) copies of the foregoing Brief In Opposition were mailed, via first class mail, postage prepaid, to R. Edwin Brown, Esquire, Brown and Sturm, P. O. Box 511, Rockville, Maryland 20850.

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